

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 8, 2007

Case Number: TSO-0483

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as “the individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual’s access authorization should be granted. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual’s access authorization should not be granted.

I. Background

The individual’s past and current illegal drug use is the crux of this case. In a Notification Letter dated January 7, 2007, the DOE advised the individual that it possessed reliable information that created a substantial doubt regarding her eligibility to hold a security clearance. In an attachment to the Notification Letter, the DOE specifically enumerated the derogatory information at issue and stated that the information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) and (l) (hereinafter referred to as Criteria K and L respectively).²

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

² Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8 (k). Criterion L relates in relevant part to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . .” 10 C.F.R. § 710.8(l).

Upon her receipt of the Notification Letter the individual exercised her right under the Part 710 regulations by requesting an administrative review hearing. On April 10, 2007, the Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in this case. I subsequently convened a hearing within the time prescribed in the regulations. At the hearing, two witnesses testified. The LSO called one witness and the individual presented her own testimony. In addition to the testimonial evidence, the LSO submitted eight exhibits into the record; the individual tendered two exhibits.

II. Standard of Review

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. Findings of Fact

The individual is an applicant for a DOE security clearance. On November 11, 2005, she completed and executed a Questionnaire for National Security Positions (QNSP) in which she revealed that she had used marijuana and hallucinogenic mushrooms within the last seven years. Exhibit (Ex.) 6. Three days later, on November 14, 2005, the individual executed a Security Acknowledgment in which she acknowledged that her use or involvement with any illegal drug could jeopardize her eligibility for a DOE access authorization. Ex. 5.

On September 25, 2006, the DOE conducted a personnel security interview (PSI) with the individual to explore, among other things, the extent and recency of the individual's illegal drug use. During the PSI, the individual stated that she had used a variety of illegal drugs in the past. Ex. 7 at 7-8. Specifically, she related that she had used opium once in December 1999, hashish six times between 2002 and 2003, and hallucinogenic mushrooms four times between 2000 and 2003. *Id.* at 7, 20-27-30-33. In addition, the individual stated that she has smoked marijuana since 1995 and continues to use that illegal substance twice per week as of September 2006. *Id.* at 9-11. The individual further related that between 2001 and 2003, she acted as a "middleman" by purchasing marijuana for others. *Id.* at 20. She also related that she closely associates with persons, including

her current roommate, who regularly use or are involved with illegal drugs. *Id.* at 32. The individual admitted at the PSI that she understood that her employer prohibits the use of illegal drugs. *Id.* at 40-41. She expressed her belief in the PSI that marijuana should be legalized and stated her view that what she does at home is her private business. *Id.* at 38. At the hearing, the individual revealed under oath that she currently smokes marijuana five times per week. *See* Transcript of Hearing (Tr.) at 59.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should not be granted at this time. I cannot find that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. The Derogatory Information and the Associated Security Concerns

The DOE invoked Criterion K in this case because the individual admitted past and current illegal drug use. From a security perspective, the use of an illegal drug can raise questions about an individual's reliability and trustworthiness, both because illegal drugs can impair a person's judgment and because the action can raise questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House.

As for Criterion L, the DOE cited the following facts to justify its reliance on that criterion in this case. First, the individual used marijuana even though she knew that her employer prohibited it. Second, she continued to use marijuana after executing security forms which expressly enumerated prohibited activities, including the use of illegal drugs. The individual's continued use of illegal substances in express contravention of her employer's and the DOE's workplace drug policy is problematic from a security standpoint because her unwillingness to comply with the law calls into question her honesty, reliability and trustworthiness. *See id.*, Guideline E.

B. Mitigation

The individual has provided no testimonial or documentary evidence to mitigate the Criteria K and L concerns at issue in this case. In fact, the individual's testimony that she smokes marijuana five times a week indicates that she has increased the frequency of her use of that illegal substance since the 2006 PSI, a fact that lends further support to the allegations before me.

With regard to Criterion K, the individual expressed her viewpoint at the hearing that marijuana should not be illegal and that it is not as "bad" as tobacco and alcohol. Tr. at 45. She also argued that her judgment is not impaired when she smokes marijuana

because she uses the drug in a responsible manner.³ Finally, she contended that her use of marijuana has not adversely affected her ability to do her job and cited her performance appraisals as support for that argument. *Id.* at 55, 89. I find all these arguments to be unavailing.

The individual's current use of marijuana alone is sufficient for me to conclude that she has not mitigated Criterion K. Other factors that militate against mitigation in this case are the following: (1) the individual is a frequent user of an illegal drug (five times a week); (2) she intends to continue using marijuana; (3) she still associates with persons who smoke marijuana; and (4) she has no intention of changing her friends or environment to minimize her contact with persons who use illegal drugs.

As for Criterion L, the individual admitted that during her seven-year employment with a DOE contractor she knew that she was violating her employer's "zero tolerance" drug use policy when she continuously smoked marijuana. *Id.* at 69-70. At the hearing, she claimed that she does not "see her job as being so important to national security that she'd stop smoking marijuana." *Id.* 81. When asked at the hearing if she had read and understood that section of the Security Acknowledgement that she had signed which expressly prohibited the use of illegal drugs by security clearance holders, the individual responded affirmatively. *Id.* at 42. She explained her actions in this regard by stating that she does not want a security clearance. *Id.* at 43. She claimed that it was her employer's decision, not hers, to apply for the security clearance. *Id.* When questioned why she did not want the security clearance, she responded that she does not want the responsibility associated with holding a security clearance and does not "have the desire to be held to that standard." *Id.*

At the hearing, the individual challenged the DOE's allegation that her use of marijuana undermines, from a security standpoint, her honesty, reliability and trustworthiness. She claimed that had it not been for her admission on a security form that she had used illegal drugs, the DOE would not have known this fact. *Id.* at 30-31. The individual is mistaken on this matter. The DOE had received information from the background investigation conducted by the Office of Personnel Management that revealed the individual's history and current use of illegal drugs.

The individual claimed at the hearing that she would discontinue her use of marijuana if she actually had to work with classified information. Under cross-examination, the individual admitted that she "went back on her word" when she told the personnel security specialist in 2006 that she would not use drugs after the PSI. *Id.* at 87. She stated that she stopped using marijuana for one week after the PSI and then resumed because "I knew that I didn't need a clearance." *Id.* at 88. I find that the individual's action in this regard further impugns her honesty, reliability and trustworthiness and casts aspersion on her claim that she would stop using marijuana if she worked with classified information.

³ She testified that she does not drive if she has used a lot of marijuana and is careful about not using too much marijuana when she is consuming alcohol at the same time. *Id.* at 64.

In sum, the individual has presented no documentary or testimonial evidence that persuades me that she has mitigated the security concerns at issue in this proceeding. I therefore find that the individual's access authorization should not be granted.

V. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth any evidence to mitigate the security concerns advanced by the LSO under either of those two criteria. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: